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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1160

TRICO MANUFACTURING COMPANY, INC.,

Petitioner,

vs.

HAZEL WALKER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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CITATIONS

Cases:

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Trico Manufacturing Company, Inc., hereby petitions this court to grant certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on September 14, 1973.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit, entered on September 14, 1973, has not yet been reported. It is reprinted in the Appendix hereto, pp. 1a-7a, *infra.*

The order of judgment of the United States District Court for the Northern District of Illinois, Eastern Division (Decker, J.), dated December 9, 1971, is not reported. It is reprinted in the Appendix hereto, p. 8a, *infra.* The memorandum opinion and order of the United States District Court for the Northern District of Illinois, Eastern Division (Decker, J.), dated April 14, 1972, denying Plaintiff Walker's post-trial motion, is not reported. It is reprinted in the Appendix hereto, pp. 9a-17a, *infra.*

JURISDICTION

The judgment and opinion of the Court of Appeals for the Seventh Circuit, was entered on September 14, 1973. On October 30, 1973, a timely petition for rehearing filed by the defendant was denied by the Court of Appeals. This petition for writ of certiorari has been filed within 90 days from the entry of the order denying rehearing.

The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the Appellate Court's assigning reversible error to the District Court's instructing the jury on assumption of risk was in direct conflict with applicable Illinois law of strict product liability.

STATEMENT OF THE CASE.

Proceedings at Trial and Appellate Levels

This personal injury action by Hazel Walker against Trico Manufacturing Company, Inc. began in October of 1970 with the filing of a complaint in the United States District Court for the Northern District of Illinois; federal jurisdiction was based upon diversity of citizenship. 28 U.S.C. §1332. Trial of the action began on November 30, 1971 before a jury; at the trial plaintiff contended that injuries to her left hand were caused by a design defect in an industrial blow mold machine manufactured by defendant. On December 2, 1971, the jury returned a verdict in favor of defendant Trico Manufacturing Company, Inc. and against plaintiff Hazel Walker. Plaintiff's post-trial motion for judgment n.o.v. or for a new trial was denied by the trial court in a memorandum opinion dated April 14, 1972.

On September 14, 1973, the Court of Appeals for the Seventh Circuit reversed the jury verdict, and remanded

the action to the District Court for a new trial. In its opinion the Court of Appeals concluded that the trial judge committed reversible error in instructing the jury on assumption of risk and misuse of the product. A timely petition by defendant for rehearing was denied by the Court of Appeals on October 30, 1973.

Facts

Plaintiff's complaint is based upon a product liability theory under the law of the State of Illinois. Specifically, plaintiff claims that the industrial blow mold machine manufactured by defendant was not reasonably safe for operators because the safety device was improperly designed, and that the improper design was the sole proximate cause of plaintiff's injury. To understand this theory, it is necessary to explain the operation of this machine.

Defendant's blow mold machine is designed to produce plactic products by extruding a hot cylinder of plastic between two die faces, each of which is shaped like a half of the product to be produced. The dies are set in a mold which closes upon the cylinder of plastic. Air is then forced into the cavity between the die faces and the plastic is literally blown into the shape of the die. When the cycle is completed, the mold automatically opens and the machine operator reaches between the then separated die faces and removes the finished product.

The cycle begins by the activation of a switch referred to as the "limit" switch. The limit switch is not usually touched by the operator. Rather, the machine is designed with a large sliding glass safety shield which slides horizontally in front of the open die press area. When the

glass shield is slid into the closed position, the area in which the die faces come together is completely shielded so that the operator cannot have his hands in the machine when the die faces close. Sliding the glass shield into the closed position also automatically activates the machine by causing the limit switch to be depressed by a metal finger which projects from the upper right hand side of the sliding glass panel. The machine is "dead" when the glass safety shield is in the open position and will activate only when the limit switch is depressed. Theoretically, the switch can only be depressed by sliding the safety shield in front of the die face area to its closed position. Actually, however, the limit switch was placed in such a position on the machine that it could be depressed by the operator. The evidence demonstrated that it was within reach of the operator and could be activated either intentionally or unintentionally.

It was plaintiff's theory that she accidentally depressed the limit switch while she was attempting to dislodge a piece of plastic which had become stuck on one of the die faces. Specifically, she asked the jury to infer that her right hand accidentally depressed the limit switch while her left hand was between the die faces trying to free the stuck plastic.

Defendant raised several defenses to plaintiff's claim including that of assumption of risk, which in Illinois is an affirmative defense to a strict products liability theory. Specifically, defendant asked the jury to infer that she knowingly depressed the limit switch in her effort to dislodge the stuck piece of plastic.

No one actually saw the accident; no one, including the plaintiff, testified as to just how the accident occurred.

In order to invoke plaintiff's theory the jury was compelled to rely upon inference; similarly, in order to invoke the defendant's theory of assumption of risk the jury was compelled to rely upon inference.

Of particular importance as a source of inference was plaintiff's state of knowledge of the function of the limit switch. Plaintiff testified that she had regularly operated the same machine for the nine months prior to the accident. She had observed and knew of the existence of the limit switch. However, she stated that she didn't know what it was there for, or what it was called. She stated she was familiar with the machine; defendant read into evidence her deposition testimony that she "didn't have no business on top of the machine." The evidence, including photographs, demonstrated that the limit switch was within easy upward reach of the machine operator.

The trial judge allowed the case to go to the jury on plaintiff's theory, and also instructed the jury as to assumption of the risk. The jury returned a verdict in favor of defendant and against plaintiff, and judgment was entered thereon. The Court of Appeals for the Seventh Circuit reversed and remanded for a new trial.

REASONS FOR GRANTING THE WRIT

In reversing the District Court, the Court of Appeals for the Seventh Circuit was in direct conflict with applicable Illinois law of strict product liability. The Seventh Circuit opinion correctly relies upon the Illinois case of *Williams* v. *Brown Mfg. Co.*, 45 Ill. 2d 418, 261 N.E.2d 305 (1970); yet the opinion fails to follow the guidelines of that case.

The trial court in *Williams* struck an affirmative defense of assumption of risk in a strict product liability action. In reversing, the Supreme Court for the State of Illinois set forth the following guidelines for the defense of assumption of risk:

> "... while the test to be applied in determining whether a user has assumed the risk of using a product known to be dangerously defective is fundamentally a subjective test, in the sense that it is his knowledge, understanding and appreciation of the danger which must be assessed, rather than that of the reasonably prudent person (Restatement [Second] of Torts, §496D, comment [c]), it must also be remembered that this is ordinarily a question to be determined by the jury. That determination is not to be made solely on the basis of the user's own statements but rather upon the jury's assessment of all of the facts established by the evidence. No juror is compelled by the subjective nature of this test to accept a user's testimony that he was unaware of the danger, if, in the light of all of the evidence, he could not have been unaware of the hazard (Restatement [Second] of Torts, §496D, comments [d] and [e]); and the

factors of the user's age, experience, knowledge and understanding, as well as the obviousness of the defect and the danger it poses, (Wade, Strict Tort Liability of Manufacturers, 19 Sw.L.J. 5 [1965], see *Pitts* v. *Basile*, 35 Ill.2d 49) will all be relevant to the jury's determination of the issue, if raised."

"A determination of the propriety of the trial court's action in striking the affirmative defense of assumption of risk must be predicated upon consideration of the totality of the evidence in its aspect most favorable to defendant. (*Pedrick* v. *Peoria & Eastern RR. Co.*, 37 Ill.2d 494.)" 45 Ill.2d at 430-431.

The conflict between the applicable Illinois law as set forth in *Williams* and the ruling herein is manifested in the following statement from the Seventh Circuit opinion:

"The record is barren of evidence to suggest that the plaintiff knew of the danger associated with manipulation of the limit switch; indeed, she was steadfast in her assertion that she knew of the location but not the purpose of the switch."

Contrary to Illinois law, the Seventh Circuit fails to consider the totality of the evidence in its aspect most favorable to the defendant. *Williams, supra; Pedrick* v. *Peoria & Eastern RR. Co.*, 37 Ill.2d 494, 510, 229 N.E.2d 504 (1967). Contrary to Illinois law the Seventh Circuit places almost complete reliance upon the statements of the plaintiff as to her knowledge of danger. *Williams, supra.*

Totality of the Evidence Considered in Its Aspect Most Favorable to Defendant

The Seventh Circuit fails to consider the totality of the evidence in its aspect most favorable to the defendant.

Instead, it concludes that the "record is barren of evidence to suggest that the plaintiff knew of the danger associated with manipulation of the limit switch." That the record is *not* barren is important, but it is not the issue urged. Illinois law requires consideration of all evidence in its aspect most favorable to the defendant. *Williams, supra.*, at 430-431; *Pedrick, supra.*, at 510.

Clearly, if the totality of the evidence is considered in its aspect most favorable to the defendant, a verdict in favor of defendant and based upon the defense of assumption of risk could stand; this is the applicable Illinois test. *Williams, supra.*, at 430-431; *Pedrick, supra.*, at 510. Plaintiff testified that she had regularly operated the same machine for the nine months prior to the accident. She had observed and knew of the existence of the limit switch. She stated she was familiar with the machine; defendant read into evidence plaintiff's deposition testimony that she "didn't have no business on the top of the machine." The evidence, including photographs, demonstrated that the limit switch was within easy upward reach of the machine operator.

This evidence, considered in its aspect most favorable to the defendant, amply supports defendant's theory that the plaintiff knowingly depressed the limit switch in her effort to dislodge a piece of plastic. The adequacy of support is manifested by the jury verdict in favor of defendant.

The terrible irony is that the record is at least as barren of evidence in support of plaintiff's theory as it is in support of assumption of risk. There is no evidence that plaintiff actually depressed the limit switch, accidentally or otherwise. It is only when the totality of the evidence

is viewed in its aspect most favorable to each party that the theory of each party can stand. The trial court applied this test to both parties; the Seventh Circuit wrongfully failed to apply it to the defendant.

Conflict Within Seventh Circuit

This irony is compounded by a second irony. On the very day that the opinion herein was filed, a different panel of the Seventh Circuit reversed a jury verdict in favor of the plaintiff, and entered judgment in favor of defendant in an Illinois strict product liability action. *Moran* v. *The Raymond Corporation,* No. 72-1499, 7th Circuit, September 14, 1973, *petition for cert. filed,* 42 U.S.L. Week 3396 (U.S. Dec. 11, 1973) (No. 73-915), reprinted herein at 18a, *infra.* The similarity between *Moran* and this action is startling. Moran was injured when his hand stuck in a machine manufactured by the defendant and defendant claimed assumption of risk. In *Moran* however, the Seventh Circuit not only stated its reliance upon *Williams,* it *followed* the guidelines of *Williams.* The court viewed all of the evidence in its aspect most favorable to plaintiff, found that the evidence so overwhelmingly favored defendant that no contrary verdict could ever stand, and ruled that the plaintiff had assumed the risk of a known danger inherent in the product.

The Seventh Circuit in *Moran* correctly viewed all of the evidence in its aspect most favorable to the opponent; on the same day, the Seventh Circuit herein did not. This discrepancy is not only contrary to the law of Illinois, it is contrary to a policy favoring uniformity of decision within a circuit. The reasoning and result of an appeal should not depend upon an accident of judicial assignment.

Complete Reliance upon Statement of the Plaintiff

The Seventh Circuit wrongfully places complete reliance upon the statements of the plaintiff as to her knowledge of danger. Such reliance harshly contradicts the guidelines of *Williams*. The determination of degree of knowledge is not to be made solely on the basis of the user's own statements, but rather upon the jury's assessment of all of the facts established by the evidence. *Williams, supra.*, at 430. The jury is not bound to accept the statements of plaintiff as determinative of the issue. In light of *all the evidence,* considered in its aspect most favorable to the defendant, the jury could find *and did find* that plaintiff knew of the danger inherent in depression of the limit switch.

The Seventh Circuit wrongfully ignores the entirety of the evidence bearing upon plaintiff's degree of knowledge of danger.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 25, 1974

APPENDIX

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

SEPTEMBER TERM, 1972 — APRIL SESSION, 1973

No. 72-1721

HAZEL WALKER,
Plaintiff-Appellant,

v.

TRICO MANUFACTURING COMPANY, INC., a Foreign Corporation,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 70-C-2556
BERNARD M. DECKER,
Judge.

ARGUED JUNE 6, 1973 — DECIDED SEPTEMBER 14, 1973

Before SWYGERT, *Chief Judge,* FAIRCHILD and STEVENS, *Circuit Judges.*

SWYGERT, *Chief Judge.* Plaintiff-appellant, Hazel Walker, appeals from a jury verdict for the defendant in her action to recover damages for an injury she sustained when her left hand was crushed in a blow-mold machine that was manufactured by the defendant. Plaintiff's action was brought in federal court under diversity jurisdiction making the law of Illinois applicable.

Plaintiff's complaint was based upon a products strict liability theory, specifically, that the defendant's machine was not reasonably safe for operators because the safety

device was improperly designed and that the improper design was the sole proximate cause of plaintiff's injury. To understand this theory, it is necessary to attempt an explanation of the operation of this rather complicated machine.

Defendant's blow-mold machine is designed to produce plastic products by extruding a hot cylinder of plastic between two die faces, each of which is shaped like a half of the product to be produced. The dies are set in a mold which closes upon the cylinder of plastic. Air is then forced into the cavity between the die faces and the plastic is literally blown into the shape of the die. When the cycle is completed, the mold automatically opens and the machine operator reaches between the then separated die faces and removes the finished product.

The cycle begins by the activation of a switch referred to as the "limit" switch. The limit switch is not usually touched by the operator. Rather, the machine is designed with a large sliding glass safety shield which slides horizontally in front of the open die press area. When the glass shield is slid into the closed position, the area in which the die faces come together is completely shielded so that that operator cannot have his hands in the machine when the die faces close. Sliding the glass shield into the closed position also automatically activates the machine by causing the limit switch to be tripped by a metal finger which projects from the upper right hand side of the sliding glass panel. The machine is "dead" when the glass safety shield is in the open position and will close only when the limit switch is tripped. Theoretically, the switch can only be tripped by sliding the safety shield in front of the die face area to its closed position. In actual fact, however, the limit switch was placed in such a position on the machine that it could be depressed by the operator. The evidence demonstrated that it was

within easy reach of the operator and could be activated either intentionally or unintentionally.

It was plaintiff's theory that she accidentally depressed the limit switch while she was attempting to dislodge a piece of plastic which had become stuck on one of the die faces. Specifically, plaintiff asked the jury to infer, though she did not actually know how the machine was activated when the safety shield was open, that her right hand accidentally depressed the limit switch while her left hand was between the die faces trying to free the stuck plastic. No one actually saw the accident. The foreman testified that when he found the plaintiff she was unconscious but that her right hand was on the frame of the safety shield in close proximity to the limit switch.

Defendant's liability was predicated upon two interlocking factors: (1) that the machine was unreasonably dangerous because the limit switch was placed within reach of the operator where it could be accidentally activated, and, (2) that the machine was unreasonably dangerous because the designer failed to cover the switch in a manner which would prevent accidental activation.

Evidence adduced at trial consisted, in part, of testimony by defendant's president and an engineering expert for each party. Plaintiff extracted from the president an admission that he had actually foreseen the possibility that an operator might accidentally activate the limit switch and that he had even considered placing a cover over the switch to obviate this danger, but decided not to do so. Plaintiff's expert testified that in his opinion the placement of the limit switch within reach of the operator without some form of safety shield rendered the machine unreasonably dangerous. He further stated that other blow-mold machines produced by different companies placed a shield over the switch. Defendant's expert and its president, the machine's designer, both testified that in their opinion the machine was not un-

reasonably dangerous. They further stated, over plaintiff's objection, that it was the practice in the trade not to shield limit switches.

In addition to asserting that the machine was not unreasonably dangerous, defendant sought to prove that plaintiff was misusing the machine at the time of the accident and, in the alternative or in addition, that she had assumed the risk of her actions. The trial court gave instructions on both defenses.

I

The plaintiff contends that the trial court erred in submitting to the jury an instruction on the affirmative defenses of misuse of the product and assumption of the risk. Her point is well taken, for neither defense has any support in the record.

Misuse of a commercial article occurs when it is used "for a purpose neither intended nor 'foreseeable' (objectively reasonable)" by its manufacturer or distributor. *Williams* v. *Brown Mfg. Co.*, 45 Ill. 2d 418, 425, 261 N.E.2d 305, 309 (1970). That description does not fit this case. The machine was being used at the time of the accident for no purpose other than the one for which it was specifically designed, namely, the manufacture of plastic articles. And Trico had foreseen the possibility that an operator of the machine might gain access to the limit switch, either by accident or by design. If, then, "purpose" as used in *Williams* is taken broadly to include even the contingencies pertaining to the operation of the machine —an interpretation which hardly flows from *Williams* with ease—Trico could not maintain its misuse defense.

The risk of conduct pertaining to a machine is assumed when its operator knows that the conduct is dangerous yet carries on with it. *Williams* v. *Brown Mfg. Co.*, 45 Ill. 2d 418, 426, 261 N.E.2d 305, 309 (1970); Restatement

(Second) of Torts, §402A, comment (n), and § 496D (1965). The record is barren of evidence to suggest that the plaintiff knew of the danger associated with manipulation of the limit switch; indeed, she was steadfast in her assertion that she knew of the location but not the purpose of the switch. Contrary to the oral argument of counsel for Trico, the record fails to indicate that the plaintiff or her fellow employees engaged in a practice of manipulating the limit switch to free articles stuck in blow-mold machines.

We conclude that the trial judge committed reversible error in instructing the jury on assumption of risk and misuse.

II

Since this case must be retried, we add our comments on other aspects of the trial attacked as erroneous. The interjection by Trico of an unsupported inference that the plaintiff had been drinking prior to the accident was unnecessarily prejudicial to her case. During cross-examination of the plaintiff, defense counsel asked several questions designed to have the jury believe that she had displayed symptoms of alcohol or drug consumption at the time she was admitted to the hospital for emergency treatment. Despite vigorous objection by her counsel, the court permitted the questions to stand on the promise of defense counsel that the matter would be linked up later by Trico when it presented its case in chief. This promise went unfulfilled. The trial court attempted to cure the error by an instruction which read:

> Arguments and statements and remarks of counsel are intended to help you in understanding the evidence and applying the law, but they are not evidence and if any statement, argument or remark had no basis in the evidence, as you recall the evidence, then you should disregard that argument, statement or remark, and you will disregard any reference

made by counsel as to the physical or mental condition of the plaintiff at the time that she received her injury.

We do not believe that the general language of that instruction could adequately cure the prejudice which likely flowed from questions asked by defense counsel.

Secondly, the trial judge erred in allowing Trico to introduce evidence of an absence of prior accidents on blow-mold machines without first laying a proper foundation therefor. Generally speaking, evidence of this sort is properly admitted only if the party-defendant shows, as foundation, that the absence of prior accidents took place with respect to machines substantially identical to the one at issue and used in settings and circumstances sufficiently similar to those surrounding the machine at the time of the accident to allow the jury to connect past experience with the accident sued upon. *See* McCormick, Evidence, §200 (2d ed., 1972). In this case, the testimony indicated that Trico had sold about 45 machines, but the record does not disclose how many of those machines had the limit switch located in the same position as the switch on the machine in question or whether there were any other material differences in such machines. Nor did the testimony identify any of the other users of the machines or give any foundation evidence whatsoever with regard to the frequency or conditions of use of such other machines. The sufficiency of foundation evidence varies from case to case and must be determined by an exercise of the trial court's discretion. Without even a minimal foundation, however, Trico should not have been permitted to introduce its evidence of an absence of prior accidents.

Lastly, the trial judge did not err in allowing Trico to introduce evidence of the "state of the art" relating to blow-mold machines and their safety devices. The plaintiff opened this matter during the presentation of

her case in chief. Having done so, she cannot complain of Trico's attempt at rebuttal. It may be true that the "state of the art" has no relevance to the defense of an action sounding in strict products liability, *see Cunningham* v. *MacNeal Memorial Hospital*, 47 Ill. 2d 443, 266 N.E.2d 897 (1970), but, just as proof of the issue by a defendant is assumed to prejudice the case of a plaintiff despite its irrelevance, it cannot be assumed that the jury would not be prejudiced against Trico by the plaintiff's introduction of the issue.

The judgment of the district court is reversed and we remand the case for a new trial.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

Name of Presiding Judge, Honorable Bernard M. Decker

Cause No. 70 C 2556 Date—Dec 2 1971

Title of Cause

Hazel Walker

v.

Trico Mfg. Machine Co.

Brief Statement of Motion

Trial

Final arguments made. Court instructs the jury, marshal sworn and Jury retires to consider their verdict. Jury returns the following verdict: "We, the Jury, find the Defendant not guilty." Verdict filed. Judgment entered on the verdict in favor of the Deft. and against Pltff.

Dec 9 1971

/s/ Decker, J

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

• • (Caption No. 70 C 2556) • •

MEMORANDUM OPINION

(Filed Apr 14 1972)

This is a motion for a judgment notwithstanding the verdict or in the alternative for a new trial made by the plaintiff, Hazel Walker, pursuant to Rules 50 and 59, F.R. Civ.P. Her underlying claim in this cause is grounded on a theory of strict liability in tort. Specifically, she alleged that the defendant, Trico Manufacturing Company, manufactured a "blow mold" machine, the design of which was so unreasonably dangerous that during her use of such a machine that design caused her to catch her hand in the machine while it was in operation, thereby causing severe injuries to it.

Defendants denied these allegations and asserted the affirmative defenses of assumption of risk and of misuse of the product. After a consideration of all of these issues, the jury found for the defendant.

The machine in question was called a blow mold machine. Essentially, it was designed to manufacture various plastic containers such as the utility cans which were being produced on the day of the accident. It produced these cans by allowing molten plastic to flow into a cavity which was shaped like the product which it was to produce. The plastic then hardened in that shape and the finished product could be removed.

More specifically, the machine operated as follows. The operator of the machine would look at the glass door at the front of the machine, and if that door was open, it

was safe to use the machine and to remove the unit which had just been produced. The inventor of the machine testified that the doors of the machine could be set so that they remained open as long as 1½ minutes. Although the evidence was not specific, it was apparent that this time interval had been considerably reduced as the result of a different setting by the foreman.

The glass door while open would interact with a "limit switch" which was located on the side of the machine opposite from where the operator stood and out of view of the operator at approximately five and one-half feet above the ground. The fact that the glass door was open would prevent the activation of the limit switch which in turn would prevent the mold faces from coming together and would also prevent the molten plastic from running into the cavity formed by the mold faces.

As to the limit switch itself, it was not protected by a cover plate and was, therefore, accessible to the inadvertent touch of a person reaching over the machine in an attempt to adjust the switch. It was this exposure which provided a major issue both with regard to the question of what actually caused the accident in question and whether a limit switch placed in that manner and acting in conjunction with the closing of the glass door provided an adequate safety system for the machine.

In essence, the evidence adduced at the trial of this cause was quite simple. Plaintiff testified that on November 18, 1968, she was working at Gotham Industries, where she had been employed for about eleven months. During the course of that employment, she had previously been called upon to operate the "blow mold" machine manufactured by the defendant. It was during that period of em-

ployment that she was instructed as to how the machine operated. This instruction included the individual instruction that when the glass door of the mold machine was open, the mold faces would not close, and the molten plastic would not run into the cavity created by the closing of the mold.

Plaintiff testified that on the day of the accident, at about three minutes to four, which was the time set for the ending of the particular shift, a piece of one of the utility cans, which were being manufactured, became stuck in the machine, and she began trying to pull it out. It was at this instant that, according to her, she heard a pop and the mold faces came together, even though the door was opened, crushing her hand.

Next, Dr. Stromberg, the doctor who treated her, testified as to the extent and nature of her injuries and the treatment that he administered therefor. He was followed on the stand by Sidney LeGuard, the foreman who was supervising the plaintiff's activities on the day in question. Mr. LeGuard was not present at the exact instant that the accident occurred and merely served to corroborate certain aspects of the plaintiff's version of the events which followed the accident. The only specific fact which he added was that when he came onto the scene of the accident, plaintiff's left hand was caught between the mold faces while her right arm was flopped over the machine with her right hand next to the limit switch.

Plaintiff's final witness was Mr. Salzenstein, a consulting engineer who was serving as plaintiff's expert. He testified that based upon his experience and upon his knowledge of the state of the art in the manufacture of these machines at the time of the manufacture of this

machine, it was his expert opinion that the design of the machine in question was unreasonably dangerous because of the design and placement of the limit switch. He then illuminated the reasons for that opinion: namely, that the switch was exposed to touch as well as to dust, which might cause it to malfunction. In addition, he noted that the switch worked toward as opposed to against gravity.

However, on cross examination, he admitted that he did not know anything about the operation and timing of the particular machine in question, and that he never spoke to any manufacturers of this type of blow mold machine.

Defendant responded to this presentation with only two witnesses. The first was Mr. Outlaw, the president of the defendant and the inventor of the machine, who had previously briefly appeared as an adverse witness called by the plaintiff. While on the stand as an adverse witness, he had merely established that he had designed the machine in question and described how it operated. His testimony for the defense was equally brief. He testified, in essence, that he had decided not to put a cover over the limit switch and that none of the other manufacturers did so either; that between 1962 and the time of the accident in question, there were no complaints about the safety system of the machine and that no accidents had been reported during that period; that the foreman could have regulated the cycle of the machine to keep the doors open for between one and one-half to two minutes, rather than the 15 seconds that it was set for; and that for these and other reasons, he felt that the machine was reasonably safe for the use for which it was manufactured and sold.

This opinion was echoed by defendant's final witness, Mr. Thayer, who, as an expert in the manufacture and design of such machines, testified that based upon his knowledge of the state of technology at the time that the machine left the defendant's control and upon his examination of the machine itself, the limit switch without the cover was not only the sole method used in the design of blow mold machines, but that it was also the best system in that it did not "challenge" the operators who, in his experience, tended to "foul up" the operation of the machine for their own purposes. Based upon these and other reasons, he concluded that the machine was reasonably safe for its intended use.

Plaintiff now files this motion for a judgment notwithstanding the verdict or in the alternative for a new trial. It is based upon a multitude of grounds, many of which are patently frivolous. The thrust of those which even merit discussion can be divided into five distinct categories which are discussed hereinafter.

Plaintiff first asserts that the court erred in admitting evidence bearing upon the "state of the art" of blow mold machines both prior to and subsequent to the date upon which the machine in question left defendant's control. Most of the evidence to which plaintiff objects in this regard is related to the questions of whether the limit switch at issue was a proper safety device and whether it was adequately protected. It is plaintiff's contention that such evidence is irrelevant or immaterial in a case grounded on strict liability. Under the circumstances of this case, I cannot agree.

The record is quite clear that during the presentation of its case in chief, plaintiff's expert, Mr. Salzenstein,

testified that based upon his knowledge of the "state of the art" which existed at the time that the machine in question left the defendant's control, he felt that its safety system did not render it safe for the use for which it was intended. Thus, when Mr. Outlaw and Mr. Thayer took the stand for the defendant to testify as to their opinion of the safety of the machine, they were quite plainly responding to plaintiff's expert's bald assertion. Obviously then, their opinions were directly relevant to the line of inquiry opened by plaintiff's expert under questioning by plaintiff's counsel. To exclude such evidence at this juncture would definitely be prejudicial to defendant.

Furthermore, in *Moren* v. *Samuel Langston & Co.*, 96 Ill. App.2d 133, 237 N.E.2d 759 (1968), in a remarkably parallel situation where the safety system of a "print slotter machine" was at issue, the court held that testimony regarding the state of the art was admissible to define certain aspects of the manufacturer's duty. Further, in *Santiago* v. *Package Machinery Co.*, 123 Ill.App.2d 305, 260 N.E.2d 89 (1970), a case involving a plastic injection molding machine similar to the one at issue in this cause, the court quite clearly held that an expert's testimony as to what is the general practice in an industry is admissible. Obviously then, under Illinois law, the testimony in question was not only relevant to the line of inquiry opened by the plaintiff and admissible on that basis, but was admissible regardless of whether the plaintiff "opened the door". It should be further pointed out that an explanatory instruction was given in this regard, making it clear that it was not a defense to this action that all other manufacturers utilized the same design.

Plaintiff next contends that it was error to allow the admission of evidence regarding the absence of accidents reported in connection with the use of this machine either prior to or subsequent to the accident in question. Such a view is contrary to Illinois law. In *Vlahovich* v. *Betts Machine Co.*, 101 Ill.App.2d 123, 242 N.E.2d 17 (1968), a strict liability case involving the manufacture of the defendant's plastic lens which shattered and thereby injured the plaintiff, that court quite clearly held that evidence of similar occurrences, or the lack thereof, was relevant and admissible on the issue of the "unreasonably dangerous condition" of the defendant's product. Accordingly, plaintiff's contention in this regard is meritless.

Plaintiff's main basis for urging this court to grant a new trial in this cause is her contention that this court erred in instructing the jury that:

> "The plaintiff claims that she was injured and sustained damages as a result of defendant designing a blow mold machine which at the time defendant sold it was *in an unreasonably dangerous condition* to plaintiff in that it had no shielding device over the safety limit switch."

Specifically, plaintiff contends that the proper instruction would have been to the effect that the design of the machine was *not reasonably safe* for its intended use. This is based upon her belief that such verbalization would have better explained the State of Illinois "strict liability" law, and that it would not have limited the inquiry as to the overall design of the machine to the question of whether the "safety limit switch", acting in conjunction with the glass door mechanism, provided an adequate safety system for the machine. I cannot agree.

Plaintiff relies on the recent case of *Cunningham* v. *MacNeal Memorial Hospital,* 47 Ill.2d 443 (1970), to argue that the standard for determining defendant's liability, in a strict liability for improper design case, is whether the design rendered the machine at issue "not reasonably safe for its intended use", rather than "unreasonably dangerous" to the operator. However, such a contention ignores the clear thrust of Illinois law in this area. In *Cunningham,* a case involving blood administered in a hospital which was *admittedly* impure, the court made it plain that "there can be no question that blood containing hepatitis virus is 'in a defective condition *unreasonably dangerous* to the user or consumer' . . ." Further, in cases which are more directly on point because they deal with the manufacturer's liability for the design of a particular machine, the Illinois courts have made it plain that the standard to be utilized is whether or not the design in question renders the machine "unreasonably dangerous" to the operator. *Santiago, supra* (a blow mold machine), and *Wright* v. *Massey Harris, Inc.,* 68 Ill.App.2d 70, 215 N.E.2d 465 (1966) (a self-propelled corn picker). Obviously then, the court's instruction accurately stated the law of Illinois.

Further, it should be pointed out that it was perfectly obvious during the course of the trial of this cause, that plaintiff was basing her case upon the question of whether the safety limit switch was properly designed. Accordingly, the instruction given was not unduly limiting.

Plaintiff further contends that this court erred in instructing the jury that "if the plaintiff's injury occurred because of her use of the product in a manner for which the product is not adapted *and* not reasonably foreseeable

to defendant, the plaintiff cannot recover". Plaintiff asserts that she must only show that she used the product in either the intended or foreseeable manner. However, to state plaintiff's argument is really to answer it.

This follows because when plaintiff's argument is stated in the negative, *e.g.*, that plaintiff must show that she did not use the product in a manner which is *not* foreseeable or *not* intended, is simply to say that defendant must show that she did neither. Accordingly, plaintiff's contention in this regard must fail.

Finally, plaintiff contends that counsel for the defendant erred in questioning the plaintiff as to her physical condition at the time of the accident with regard to drinking or the use of drugs. However, in this regard, it must be pointed out that defendant's counsel informed the court that he was not able to connect this testimony up with Dr. Stromberg's testimony as he had planned; that plaintiff's counsel agreed at that time that a prohibitory instruction would cure any possible harm; that such an instruction was given and that plaintiff's counsel did not object thereto. Thus, it is obvious that plaintiff cannot now seek to urge this as a ground for a new trial, and that if she does so, that ground must fail.

In light of the foregoing, plaintiff's motion for a judgment notwithstanding the verdict and in the alternative for a new trial is hereby ordered denied.

Enter:

/s/ Bernard M. Decker
United States District Judge

Dated: April 14, 1972.

In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

SEPTEMBER TERM, 1972 — APRIL SESSION, 1973

No. 72-1499

JUAN MORAN,

Plaintiff-Appellee,

v.

THE RAYMOND CORPORATION,

Defendant-Appellant.

Appeal from the United States District Court for the Northen District of Illinois, Eastern Division.

No. 70 C 724

ALEXANDER J. NAPOLI, *Judge.*

ARGUED APRIL 26, 1973 — DECIDED SEPTEMBER 14, 1973

Before MOORE, *Senior Circuit Judge,** and CUMMINGS and PELL, *Circuit Judges.*

PELL, *Circuit Judge.* Defendant, The Raymond Corporation (Raymond), appeals from a judgment for $250,000.00 entered on a jury verdict in favor of plaintiff, Juan Moran, on his complaint for personal injuries he had allegedly received while he was an employee of Central Steel and Wire Company (Central).

Raymond manufactured a lift truck, known as a side-loader, which was designed to operate in narrow aisles.

* Senior Circuit Judge Leonard P. Moore of the United States Court of Appeals for the Second Circuit is sitting by designation.

It differs from the standard fork lift truck, on which the load is carried fully beyond the front wheels in that, as the name sideloader indicates, the load-lifter is located on one side of the equipment and extends equidistant over the front and rear sets of wheels. At one end of the equipment there is located an operator's cage with the controls inside. Moran had operated a sideloader at Central for approximately three months. On the night in question, he was in the process of returning a tray to a rack approximately eight or nine feet above the ground when some wire rods on the tray slipped therefrom. In attempting to correct this situation, Moran left the operator's cage and first stood on the moveable forks and eventually on a platform below the works. Still not achieving the desired result, he attempted to lower the forks but rather than returning to the cage and while standing on the platform on the lift side of the equipment, he reached through an opening into the cage and pulled the control lever to lower the forks. Although he tried to bring his hand back quickly, it became stuck because of a bandage he had on his wrist. When the cross bar came down with a shearing action, Moran's right arm was seriously injured.

Moran's complaint was based on both negligence and strict liability theories. Among Raymond's defenses were that the lift truck was not defectively manufactured (and therefore could not be the basis of a strict liability in tort claim), that Moran had assumed the risk, and that Moran had misused the sideloader so as to bar recovery as a matter of law. The jury rejected all of the defenses and answered special interrogatories finding no assumption of the risk or misuse.

Initially we must decide whether or not we can review the sufficiency of the evidence in this case. Defendant moved for a directed verdict at the close of plaintiff's case and the district judge took the motion under advisement. There is no indication in the record that the motion was

renewed in writing at the time the presentation of the evidence was completed. Rule 50, Fed. R. Civ. P., provides in part that "[a] party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made." "Nevertheless, the courts have adhered to the longstanding rule that the introduction of evidence at that point constitutes a waiver of the objection to the sufficiency of the evidence unless the motion is renewed at the time when all the evidence is in. What this means is that after the moving party has offered evidence: (1) the motion cannot serve as a necessary predicate for a motion for judgment under Rule 50(b); and (2) it cannot serve as the basis for attacking the sufficiency of the evidence in the appellate court. And this doctrine would appear to be applicable though the motion at the close of the opponent's case was reserved by the court rather than denied." 5A Moore, Federal Practice ¶ 50.05[1], at 2341-2 (2d ed.) (Footnotes omitted.)

9 Wright & Miller, Federal Practice and Procedure: *Civil* § 2536, at 593 (1971), states basically the same doctrine as follows:

> "It is thoroughly established that the sufficiency of the evidence is not reviewable on appeal unless a motion for directed verdict was made in the trial court. Indeed a motion at the close of plaintiff's case will not do unless it is renewed at the close of all the evidence nor will the appellate court review the sufficiency of the evidence if the trial court has denied a motion that does not state specific grounds." (Footnotes omitted.)[1]

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[1] A further complication enters the picture at this point although not raised by the plaintiff. The written motion filed by defendant at the close of plaintiff's evidence did not specify any grounds. However, counsel in argument to the court before introducing any

In an affidavit filed with his reply brief in this court, counsel for Raymond states that during an in-chambers but off-the-record conference with the district court judge he informed the judge that he had a motion for a directed verdict at the close of all of the evidence that he would like to have filed. Judge Napoli assertedly replied that the ruling on that motion would be the same as the ruling he made concerning the earlier motion for directed verdict, namely, that he would take it under advisement and that the ultimate ruling on both motions would be the same. "Therefore, I did not file a written Motion for Directed Verdict at the close of all the evidence." Judge Napoli, however, is deceased and in a counter-affidavit counsel for the plaintiff denies he was present at the purported conversation in chambers with the judge relating to a motion for a directed verdict at the close of all of the evidence. Defense counsel in his affidavit had indicated he was not certain whether plaintiff's counsel had heard the colloquy concerning a possible final motion for directed verdict.

The issue of whether we should consider this appeal as though a motion for directed verdict had been made at the close of all of the evidence becomes a close question because neither in argument on the defendant's post-trial motion, nor at any other time in the district court, did

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evidence made it abundantly clear that the defendant was relying on assumption of risk and misuse. An Illinois case bearing on the defense of assumption of risk, *Williams* v. *Brown Mfg. Co.*, 45 Ill.2d 418 (1970), was cited to the court. Although Rule 50(a) Fed.R.Civ. P. requires that the motion shall state the specific grounds, the "rule does not require technical precision in stating the grounds of the motion. . . . Although it is said that the better practice is for the motion to be in writing, the rule makes no such requirement and an oral motion on the record will suffice. An oral statement of grounds may save a written motion that is too general." 9 Wright & Miller, *supra*, §2353, at 580-1. (Footnotes omitted.) We hold, therefore, that the motion at the close of plaintiff's evidence was sufficient under Rule 50(a).

the plaintiff raise the question of lack of timing of this motion. Instead, at the time of the argument in the district court, plaintiff's counsel stated:

> "Under the applicable rules, the grounds for seeking a judgment notwithstanding the verdict must be identical and not expansive over theirs which were asserted in the motion for directed verdict at the close of the plaintiff's case, at the close of all the evidence, and upon which the Court has ruled on the 11th of April of this year."

We do not view favorably the raising of an issue, particularly a technical one, for the first time on appeal. On the other hand, it is incumbent on counsel to make the record in the district court as to issues he wishes to present on appeal.

Raymond relies on two cases to support its contention that we are not foreclosed from examining the evidence in this case. In *United States* v. *353 Cases,* 247 F.2d 473 (8th Cir. 1957), the Government had brought a condemnation action against allegedly misbranded mineral water. At the close of the defendant's case the Government moved for a directed verdict, which was not granted. The Government called two rebuttal witnesses and the claimants called one surrebuttal witness. None of these witnesses testified concerning the grounds for the motion for a directed verdict. The Government failed to renew the motion at the close of all of the evidence and the district court subsequently denied judgment notwithstanding the verdict relying, in part, on the failure to renew the motion for a directed verdict. The Eighth Circuit reversed, stating:

> "We think that as a practical matter the Government did all that was necessary to preserve for review the question whether it was entitled to a directed verdict. This Court, moreover, in the public interest and to guard against injustice, may, of its own mo-

> tion, notice errors which have not been properly preserved for review, if such errors are obvious, or if they otherwise seriously affect the fairness and integrity of the judicial proceedings." 247 F.2d at 477.

While not mindful of the pragmatic values reflected in the above language, we also note that the exception carved out is most narrowly stated and is certainly based in part on the fact that the rebuttal witnesses testified only on collateral issues.

The second case on which Raymond relies is *Bayamon Thom McAn, Inc.* v. *Miranda,* 409 F.2d 968 (1st Cir. 1969). The case is somewhat similar to the one before us. The defendant had moved for a directed verdict at the close of the plaintiff's case and the district court had reserved its ruling. Defendants then submitted eight exhibits, none of which dealt with the issue of negligence or contributory negligence, but failed to renew their motions for directed verdicts. The court held that the defendants had not waived their right to move for judgment notwithstanding the verdict. The court relied on two factors. First, the district court itself showed that it felt that the defendants had preserved their point:

> "[i]n a sense the court may well have led counsel reasonably to believe that all had been done that was necessary. . . . This factor alone would be of no avail to appellants had the evidence subsequently presented been previously unrevealed, lengthy, or relevant to the issues raised by the motions for a directed verdict. [Citation omitted.] But this part of the trial, occupying only two pages of transcript and involving no more than a few minutes, held no surprises." 409 F.2d at 971-972.

The case before us is similar to *McAn* to the extent that there may have been implied assurances by the district court that the record was preserved. However, the

defendant in the present case did introduce more than an inconsequential amount of testimony following its motion for a directed verdict at the close of the plaintiff's case. Six witnesses, including the plaintiff as an adverse witness, testified. Their testimony covers 110 pages of the transcript.

In the First Circuit's own construction of *McAn* in *Gillentine* v. *McKeand*, 426 F.2d 717, 722 (1st Cir. 1970), it was emphasized that *McAn* was based on the fact that the evidence introduced by the defendant subsequent to its motion for a directed verdict, "could not conceivably alter the court's decision on a motion for a directed verdict."

Some status of ambivalency results from the emphasis on the extent of the evidence which comes in after the first motion for a directed verdict is overruled. On the one hand, if there is substantial evidence introduced by the defendant and the motion is not renewed, the trial judge may be deprived of the opportunity, which he should have, of determining whether there was a sufficiency of evidence, based on *all* of the evidence. "[T]he litigant who has not moved for a directed verdict in the trial court must have been of the view that the evidence made a case for the jury; he should not be permitted on appeal to impute error to the trial judge for sharing that view." *Little* v. *Bankers Life & Casualty Company*, 426 F.2d 509, 511 (5th Cir. 1970). Also we are not mindful that "it not infrequently happens that the defendant himself, by his own evidence, supplies the missing link . . . ." *Bogk* v. *Gassert*, 149 U.S. 17, 23 (1893).

On the other hand, if on analysis the additional evidence, even though extensive, accomplishes what the defendant intended it should, i.e., strengthening his case without simultaneously exposing a flaw, little justification would seem to exist for finding significance in the quantitative aspect where the trial judge has reserved ruling on the first motion until after all evidence has been put in, and,

at the time of ruling, the evidence and issues are no weaker from the viewpoint of the movant than those which would have been presented had the second motion been filed.

As a background for our further consideration of the narrow issue before us we note from our examination of the record that the defendant's evidence did not aid plaintiff's position that there was no assumption of risk. Indeed, when the plaintiff himself, as an adverse witness, was put on the witness stand, he admitted that when he had been instructed on how to run the machine, he had been told always to stand in the cage when operating the controls. He further stated that because he knew he would be hit if he did not get out of the way he had pulled the control fast and withdrawn his hand quickly.

We now turn to the procedural aspects of the record made in the district court to aid us in determining whether Raymond has forfeited the privilege of challenging the sufficiency of the evidence. We have already adverted to the statement made by plaintiff's counsel which, inferentially at least, supports the premise that the district court judge did consider, when he finally overruled the motion for a directed verdict, that he was doing so on the basis of the sufficiency of all of the evidence.

On Friday, March 10, 1972, the plaintiff concluded his evidence and rested. Raymond's motion for directed verdict was filed. The judge said he would reserve ruling on it until after he had heard argument. On the following Monday, March 13, 1972, as previously noted herein, the counsel for Raymond argued that there were sufficient facts to constitute assumption of risk as a matter of law. Counsel for Moran argued that the question was for the jury.

"THE COURT: [at the conclusion of the argument] All right. I am going to reserve my ruling. Let's go ahead."

At the conclusion of the evidence on March 13, the jury was excused and the judge had an unrecorded conference with counsel in chambers on instructions. It apparently was at this conference that the disputed colloquy concerning a final motion for directed verdict allegedly took place.

On the following day the court indicated it was going to go on the record in chambers with reference to the instructions "and everything we discussed after adjournment yesterday." The ensuing discussion concerned which of the tendered instructions would be given and which would be refused.

Moran objected to the giving of an instruction tendered by the defense because he did not believe that misuse was properly an issue although he agreed that assumption of risk was.

"THE COURT: In our informal discussion last evening, outside the presence of the court reporter, we discussed these questions. The Court decided that both misuse and assumption of risk would be proper in this case. Therefore, the objection is overruled, and Defendant's tendered Instruction No. 6 will be given."

The record is not helpful at this point, therefore, in determining what exactly may have been said, if anything, at the unrecorded session on the matter of the filing of a final motion for a directed verdict. It is clear, however, that there was an informal, unreported session, that the original motion for directed verdict which had been filed and argued had never been ruled on, and that the issue of assumption of risk was to be submitted to the jury.

The jury reached a verdict on the date of submission of the cause to it. On March 28, 1972, the cause was continued to April 11, 1972, for further ruling. On the latter date, defendant's motion for a directed verdict was denied and judgment was entered. On April 20, 1972, the

defendant filed its motion for judgment notwithstanding the verdict or in the alternative for a new trial.

The following extracts are from that motion:

• • • •

". . . and in support of this motion, in addition to those grounds stated in the Motion for Directed Verdict made at the close of all the evidence, states as follows:

• • • •

11. As a matter of law, the plaintiff's use of the product at the time of the occurrence with full knowledge that he was in a position of danger, that there was a safer method by which he could have performed the function he was trying to perform and that he nevertheless proceeded with knowledge of the danger, constitutes assumption of risk which will bar a recovery of the plaintiff.

• • • •

16. The Court erred in failing to direct a verdict for the defendant either at the close of the plaintiff's evidence or at the close of all the evidence."

At the inception of the argument, the judge asked counsel for Raymond whether all of the argument had not already been heard. Counsel replied that while the primary discussion before had been concerning assumption of risk, the motion raised a number of other matters which hadn't really been stressed before. After adverting to some of the new matters in the motion, counsel returned to an argument on assumption of risk. Counsel for Moran, addressing himself first to the motion for judgment n.o.v., objected to the consideration of any new matters not "asserted in the motion for directed verdict at the close of the plaintiff's case, at the close of all the evidence, and upon which the Court has ruled on the 11th of April this year." At no time was it suggested by counsel that the matter of assumption of risk was a new matter. Nor,

more importantly, was there any intimation that the motion for judgment n.o.v. should not be entertained because a motion for directed verdict was not made at the close of all of the evidence. Yet, the authorities indicate that the filing of this motion at the completion of the evidentiary presentation is a requirement for consideration of the motion for judgment n.o.v. just as it is for appellate consideration of the sufficiency of the evidence on the denial of the motion for directed verdict, since the n.o.v. motion is technically only a renewal of the motion for directed verdict. 9 Wright Miller, *supra*, §2537, at 596-8.

However, it also appears well established that the courts take a liberal view of what constitutes a motion for directed verdict in deciding whether there was a sufficient prerequisite for the motion for judgment. *Ibid* at 596-7. The standard for granting the n.o.v. motion is the same as for the directed verdict motion. *Ibid* at 599. It appears to us that the rationale of the liberality referred to in the text, *inter alia*, flows from the fact that when the n.o.v. motion is filed in the district court, there has been a presentation to the trial judge of the reasons for taking the case from the jury.

While the record is scanty, and it would have been helpful to have known all that transpired in the off-the-record conference, we are satisfied that the contentions of the defendant that it was entitled to a determination that there was assumption of risk as a matter of law was adequately presented to the trial judge at the necessary time. To reach any other result would be to enshrine form over substance. Accordingly, we turn to a consideration of the sufficiency of the evidence for the purpose of determining the correctness of the district court's denial of judgment notwithstanding the verdict.

Under Illinois law, which is controlling on this aspect of the case, *Illinois State Trust Co.* v. *Terminal R.R. Ass'n of St. Louis*, 440 F.2d 497, 500 (7th Cir. 1971), a judgment

should be directed or entered n.o.v. "only in those cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand." *Pedrick* v. *Peoria & Eastern R.R. Co.*, 37 Ill.2d 494, 510 (1967)

We do not have to determine whether Raymond is correct in its contention that its lift truck was not "defective" as that term is used to invoke the doctrine of strict liability in tort actions since we find it clear under the *Pedrick* test that Moran assumed the risk. The Illinois Supreme Court adopted the doctrine of strict liability in tort in *Suvada* v. *White Motor Co.*, 32 Ill.2d 612, 210 N.E.2d 182 (1905). In *Williams* v. *Brown Manufacturing Co.*, 45 Ill.2d 418, 261 N.E.2d 305 (1970), the court held that simple contributory negligence, which would bar recovery by a plaintiff in a tort action based on negligence, would not preclude recovery in a suit based on a strict liability theory, 45 Ill.2d at 426.

The court held, however, "that a plaintiff who knows a product is in a dangerous condition and proceeds in disregard of this known danger (often termed 'assumption of risk') may not recover for resulting injuries." 45 Ill.2d at 426.[2] The test which the jury was to apply was

> ". . . whether a user has assumed the risk of using a product known to be dangerously defective is fundamentally a subjective test, in the sense that it is *his* knowledge, understanding and appreciation of the danger which must be assessed, rather than that of the reasonably prudent person (Restatement (Second) of Torts, §496D, comment (c)), it must also be

[2] The court also held that "plaintiffs who 'misuse' a product—use it for a purpose neither intended nor 'foreseeable' (objectively reasonable) by the defendant—may be barred from recovery." 45 Ill.2d at 425.

remembered that this is ordinarily a question to be determined by the jury. That determination is not to be made solely on the basis of the user's own statements but rather upon the jury's assessment of all of the facts established by the evidence. No juror is compelled by the subjective nature of this test to accept a user's testimony that he was unaware of the danger, if, in the light of all of the evidence, he could not have been unaware of the hazard (Restatement (Second) of Torts, §496D, comments (d) and (e)); and the factors of the user's age, experience, knowledge and understanding, as well as the obviousness of the defect and the danger it poses, (Wade, Strict Tort Liability of Manufacturers, 19 Sw. L. J. 5 (1965), see *Pitts* v. *Basile,* 35 Ill.2d 49) will all be relevant to the jury's determination of the issue, if raised." 45 Ill.2d at 430-431. (Emphasis in original.)

This standard was reaffirmed by the Illinois Supreme Court in *Sweeney* v. *Max A. R. Matthews & Co.,* 46 Ill.2d 64, 264 N.E.2d 170 (1970).

Although the test of assumption of risk is a subjective one, depending on the knowledge of the injured party, it is apparent that the question need not always go to the jury. The language in *Williams, supra,* that the defense of assumption of the risk ordinarily presents a question to be determined by the jury while permitting the jury to disbelieve the injured party's testimonial denial of knowledge of the danger, even though the test is a subjective one, does not mean that a jury question is presented when the testimony is clear that he did know of the danger.

In *Fore* v. *Vermeer Manufacturing Co.,* 7 Ill. App.3d 346, 287 N.E. 2d 526 (3d Dist., 1972), the court affirmed the grant of summary judgment against the plaintiff when the plaintiff admitted in his deposition that he had had

numerous past difficulties with the machine: "It appears to be clear that the plaintiff had actual knowledge of the danger; that he understood and appreciated the risk, and that he deliberately exposed himself to such risk, all while he was of full age, well experienced, with complete knowledge and understanding, of an obvious defect, and an obvious danger." 287 N.E.2d at 527-528. A similar result was reached in the affirmance of a directed verdict at the close of the plaintiff's evidence in *Denton* v. *Bachtold Brothers, Inc.*, 8 Ill. App.3d 1038, 291 N.E.2d 229 (4th Dist., 1972). Plaintiff has provided us with no contrary citation of authority.

If we now turn to Moran's own testimony and apply the Illinois standards for assumption of the risk, it becomes clear that Moran, on the testimony in this record, assumed the risk. Moran testified that he had been working at Central for approximately five months at the time of the accident. During the first two months he did not drive a sideloader. During the next three months, following a week of training including how to operate the machine, he had filled many orders daily, all with the help of a Raymond sideloader. Although at one point he testified that he had never been told not to operate the machine from outside the driver's cage, he later admitted that he had been instructed to stand in the cage "when you are operating the controls." He clearly knew that there was a substantial risk involved in working with the machine. Particularly, however, and most significantly, he recognized the danger in operating the machine in the way he was at the time he was injured since he testified that he knew the bar would hit him if he did not move out of the way: "That's why I pulled the control fast and I withdrew the hand quickly." The bar was about a foot and a half above his head when he pulled the lever to lower the forks.

While one who stands under the guillotine blade with knowedge of the fact that there will be a descent of the operational part upon activation of the controlling lever would scarcely seem to be in a position to claim that the blade fell faster than he anticipated, nevertheless, we find no support in the record for Moran's contention that the lowering speed of the sideloader he had been operating for several hours at the time of the accident was greater than was that of the sideloader he had previously operated.

By way of summary, Moran, standing out of the operator's cage in a position where he would be in the path of the equipment if it was caused to become operative, reached with some effort on his part into the control area and pulled the control lever down as far as it would go. He knew when he did that, the forks would start coming down and would go all the way to the bottom unless he pushed the lever back. This was clearly proven subjective evidence and the verdict, under the *Pedrick* test, cannot stand. Plaintiff argues that "[t]o say that Juan Moran consciously assumed the risk of his own injury would, under the circumstances, be to say that he intended to maim himself, or he was bent upon suicide." This conclusion does not follow. What is clear is that Moran was in a hurry and that he took a calculated risk that he could get his hand out of the way before the forks hit him. Workmen often take risks which they should not take and are fortunate enough to avoid injury. In finding that Moran assumed the risk, we are not dealing with the waiver of a constitutional right designed to protect fair trial. *cf. Schneckloth* v. *Bustamonte,* 41 U.S.L.W. 4726 (U.S., filed May 29, 1973), but rather with a hasty, but nonetheless knowing, decision. Obviously Moran, who had operated the machine from the front of the forks before without misadventure, *thought* he could do so again. But that is not the test applied in Illinois. The test, although subjective, relates to knowledge of the risk and

not to whether it was a good risk. See *Fore* v. *Vermeer Manufacturing Co., supra,* and *Denton* v. *Backtold Brothers, Inc., supra.*

For the reasons hereinabove set out, the judgment of the district court is reversed.

REVERSED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

OCTOBER 30, 1973

Before

Hon. LUTHER M. SWYGERT, Chief Judge

Hon. THOMAS E. FAIRCHILD, Circuit Judge

Hon. JOHN PAUL STEVENS, Circuit Judge

HAZEL WALKER, Plaintiff-Appellant,

No. 72-1721 vs.

TRICO MANUFACTURING CO., INC., Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. (70 C 2556)

On consideration of the petition for rehearing filed in the above-entitled cause,

IT IS HEREBY ORDERED that the petition for rehearing in the above-entitled appeal be and the same is hereby denied.